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COMPREHENSIVE CRIMINAL FORFEITURE ACT OF 1982

AUGUST 10 (legislative day, JULY 12), 1982

Mr. THURMOND, from the Committee on the Judiciary, submitted
the following

REPORT

[To accompany S. 2320]

The Committee on the Judiciary, to which was referred the bill (S. 2320) to amend section 1963 of title 18 of the United States Code and the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.) to provide for the criminal forfeiture of the proceeds of racketeering activity, to provide for the sanction of criminal forfeiture for all felony drug offenses, to facilitate forfeitures in drug related and racketeering cases, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill pass.

GENERAL STATEMENT AND HISTORY OF THE BILL

Drug trafficking and racketeering are among the most serious problems facing the country. Profit is the motivation for this criminal activity, and it is through economic power that it is sustained and grows. More than ten years ago, the Congress recognized in its enactment of statutes specifically addressing organized crime and illegal drugs¹ that the conviction of individual racketeers and drug dealers would be of only limited effectiveness if the economic power bases of criminal organizations or enterprises were left intact.

S. 2320 was introduced by Senator Thurmond on March 31, 1982, at the request of the Administration upon a common recognition of the fundamental present and potential importance of forfeiture as

¹ 18 U.S.C. 1961 et seq. and 21 U.S.C. 841.

BEST DOCUMENT AVAILABLE

a weapon against organized crime and illegal drugs. In its submission to the Congress, the Department of Justice noted:

Organized group criminal activity and narcotics trafficking are among the gravest of our national crimes problems, and accordingly, the Department of Justice has given the highest priority to the enforcement of our racketeering and narcotics laws. In no small part, the persistence and pervasiveness of racketeering and drug trafficking is due to the economic power which is generated by and which maintains such criminal activity. Thus the effectiveness of society's efforts to punish and deter the commission of these offenses depends to a significant degree on our ability to deprive those engaged in organized crime and illicit drug trafficking of their sources of this economic power.

After summarizing the main features of the proposal, the Department concluded:

In sum, it is our view that the enclosed legislative proposal would significantly improve the government's ability to separate racketeers and major drug offenders from their sources of economic power by obtaining the forfeiture of the property which they derive from and use to sustain their criminal activity. Without such tools, efforts to combat the increasingly serious problem of organized crime and illicit trafficking in dangerous drugs cannot be fully effective.

Improvement in the forfeiture laws is of bipartisan concern. During his tenure as Chairman of the Subcommittee on Criminal Justice in the 96th Congress, Senator Biden held hearings on forfeiture of narcotics proceeds and has introduced other legislation on the subject in this Congress. A further hearing was held this Congress on April 23, 1982, by the full Committee for the primary purpose of receiving comments by the Department of Justice on S. 2320.

Today, few in the Congress or the law enforcement community fail to recognize that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs which, with its inevitable attendant violence, is plaguing the country. Clearly, if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made.

There are presently two types of forfeiture statutes in Federal law. The first, civil forfeiture of criminal-related property through an *in rem* proceeding, has long been a part of Federal statutory law. A variety of assets used in drug violations, such as boats, cars, and manufacturing equipment, may be civilly forfeited under 21 U.S.C. 881. And since 1978, this statute has also provided for the civil forfeiture of the proceeds of illicit drug transactions. Utilizing this civil forfeiture statute, then, can prevent the continuing use of property in drug crimes, and can also have a deterrent and punitive effect on drug violators.

The other type of forfeiture, criminal forfeiture, is relatively new to Federal law, although it has its origins in ancient English common law. Congress first acted to provide for criminal forfeiture, a sanction imposed upon a defendant's criminal conviction, when it passed the Racketeer Influenced and Corrupt Organizations (RICO) statute (18 U.S.C. 1961 et. seq.) and the Continuing Criminal Enterprise (CCE) statute (21 U.S.C. 848). These statutes address, respectively, the conduct, acquisition, and control of enterprises through patterns of racketeering activity, and the operation of groups involved in patterns of serious drug offenses. Inclusion of the penalty of criminal forfeiture in both these statutes reflected the understanding of the importance of the economic aspects of these crimes and the valid conclusion that with respect to these types of offense, effective tools to remove the wealth generated by and used to maintain organized criminal activity were needed in addition to the traditional penalties of fine and imprisonment.

It was hoped that through the use of these three statutes (the civil forfeiture provisions of 21 U.S.C. 881 and the criminal forfeiture provisions of the RICO and CCE statutes) that forfeiture would become a powerful weapon in the fight against drug trafficking and racketeering. But the record of obtaining significant forfeitures in narcotics and organized crimes cases, particularly in contrast with the burgeoning illicit drug trade, is viewed with some disappointment.² To be sure, Federal law enforcement agencies have, in recent years, placed an increased emphasis on forfeitures and progress has been made. For example, seizures of assets in drug cases now run into the millions of dollars. However, in light of the fact that the profits produced by drug trafficking are estimated to be in the billions, if not the tens of billions of dollars annually, it is clear that the full law enforcement potential of forfeiture is not being realized. Serious impediments to reaching this goal are the limitations and ambiguities of current forfeiture statutes, and it is these deficiencies in current law that this legislation is designed to correct.

While there are a variety of problems posed by present forfeiture statutes, the most significant of these arise in three areas. First, the scope of property subject to forfeiture is, in two important respects, too limited. The RICO statute, which was designed to deprive racketeers of the economic power generated by and used to sustain organized criminal activity has been interpreted by several courts so as to prevent the criminal forfeiture of a defendant's ill-gotten profits, even though other of his interests used or acquired in violation of the RICO statute would be forfeitable.³ The result of exempting racketeering proceeds from RICO's criminal forfeiture scheme has been to seriously undercut the statute's utility and significantly limit the extent of RICO forfeitures, particularly in cases involving wholly criminal enterprises where there may be little other than profits in the way of forfeitable assets. By amending 18 U.S.C. 1963 to include specifically the proceeds of racketeering

² See, e.g., *Hearings on Forfeiture of Narcotics' Proceeds* before the Subcommittee on Criminal Justice, Senate Committee on the Judiciary, 96th Cong., 2d Sess. (1980).

³ See, e.g., *United States v. Martino*, 648 F.2d (5th Cir. 1981) (vacated in part, rehearing *en banc* pending), in which insurance proceeds obtained from an arson-for-profit scheme prosecuted under 18 U.S.C. 1962, were held not subject to forfeiture under 18 U.S.C. 1963.

among the property subject to criminal forfeiture, the bill would cure this problem.

The extent of drug-related property subject to civil forfeiture under 21 U.S.C. 881 is also too limited in one respect. Under current law, if a person uses a boat or car to transport narcotics or uses equipment to manufacture dangerous drugs, his use of the property renders it subject to civil forfeiture. But if he uses a secluded barn to store tons of marihuana, or uses his house as a manufacturing laboratory for amphetamines, there is no provision to subject his real property to civil forfeiture, even though its use was indispensable to his commission of a major drug offense and the prospect of the forfeiture of the property would have been a powerful deterrent. As amended by the bill, 21 U.S.C. 881 would permit the forfeiture of real property used in major drug trafficking crimes.⁴

A second serious problem in achieving the forfeiture of significant assets in racketeering and drug cases is that the criminal forfeiture provisions of the RICO and CCE statutes fail to adequately address the phenomenon of defendants defeating forfeiture by removing, transferring, or concealing their assets prior to conviction. Unlike civil forfeitures, in which the government's seizure of the asset occurs at or soon after the commencement of the forfeiture action, in criminal forfeitures, the assets generally remain in the custody of the defendant until the time of his conviction for the offense upon which the forfeiture is based. Only after conviction does the government seize the asset. Thus, a person who anticipates that some of his property may be subject to criminal forfeiture has not only an obvious incentive, but also ample opportunity, to transfer his assets or remove them from the jurisdiction of the court prior to trial and so shield them from any possibility of forfeiture.

Currently, the only mechanism available to the government to prevent such actions is the authority to obtain a restraining order, and this statutory authority is limited to the post-indictment period. Thus, even if the government is aware that a person is disposing of his property in anticipation of the filing of criminal charges against him, it has no specific authority under the RICO or CCE statutes to obtain an appropriate protective order. Furthermore, even if the government is able to obtain a restraining order, should the defendant choose to defy it, he can effectively prevent the forfeiture of his property and face only the possibility of contempt sanctions for his defiance of the court's order. The important economic impact of imposing the sanction of forfeiture against the defendant is thus lost.

The problem of pre-conviction dispositions of property subject to criminal forfeiture is further complicated by the question of whether, simply by transferring an asset to a third party, a defendant may shield it from forfeiture. In civil forfeitures, such transfers are avoidable, for the property is considered "tainted" from the time of its prohibited use or acquisition. But it is unclear whether, in the context of criminal forfeitures, the same principle is applicable.

In sum, present criminal forfeiture statutes do not adequately address the serious problem of a defendant's pretrial disposition of

⁴ Real property is subject to criminal forfeiture under the RICO and CCE statutes.

his assets, and changes are necessary both to preserve the availability of a defendant's assets for criminal forfeiture, and, in those cases in which he does transfer, deplete, or conceal his property, to assure that he cannot as a result avoid the economic impact of forfeiture. Such changes are incorporated in this bill. First, the government would be permitted, in limited circumstances, to obtain a restraining order in the pre-indictment period. Second, the "taint" theory, long a principle in civil forfeiture, is incorporated so that pre-conviction transfers of forfeitable assets would no longer be an easy loophole for avoiding forfeiture. Third, in those cases in which a defendant has moved or concealed his assets or otherwise made them unavailable for a forfeiture order, the court would be authorized to order the defendant, upon his conviction, to forfeit substitute assets.

The third major problem arises from the need to pursue virtually all forfeiture of drug-related property through civil proceedings. Until recently, civil forfeiture proceedings under title 21 were not perceived as particularly problematic. Indeed, in certain respects, civil forfeiture has advantages over criminal forfeiture. As noted above, property is generally seized early on in a civil forfeiture case, thus limiting the problem of transfers and concealment of assets, and also the government's burden of proof is lower in these cases. However, as drug trafficking has increased and the government has stepped up its enforcement and forfeiture efforts, the backlog of civil forfeiture cases in some parts of the country has become unmanageable. A way of relieving this problem would be to allow Federal prosecutors, in appropriate circumstances, to pursue criminal, rather than civil, forfeitures in drug cases. The problem with civil forfeiture is that even if the same facts that are at issue in a criminal trial are also dispositive of the forfeiture issue, it is still necessary for the government, in addition to the criminal case, to file a separate civil suit. And where the property of a defendant, or defendants, in the criminal case is located in more than one judicial district, a separate civil forfeiture suit must be filed in each of these districts.

A more efficient method of obtaining the forfeiture of assets of drug defendants would be to permit prosecutors the option of pursuing a criminal forfeiture in which the forfeiture action can be consolidated with the prosecution of the offense giving rise to forfeiture. In cases where this alternative could be pursued, valuable judicial and law enforcement resources could be saved. This bill permits the use of this alternative by creating a criminal forfeiture statute that would be applicable in all major drug prosecutions and would permit the criminal forfeiture of the proceeds a defendant has derived from the drug offense and of any other property used in the commission of the offense.

By changing and clarifying current forfeiture laws to address these and other problems that have been encountered in reaching the assets of drug traffickers and racketeers, this bill can strengthen forfeiture so that it may become the powerful law enforcement tool it can and should be.⁵

⁵ Due to time constraints for Committee consideration of S. 2320, Senator Thurmond deferred for action on the Senate floor a number of non-controversial amendments for himself and Sena-

SECTION-BY-SECTION ANALYSIS

Section 101—Criminal Forfeiture in RICO Cases

Presently, 18 U.S.C. 1963 sets out the penalties applicable for a violation of the RICO offenses described in 18 U.S.C. 1962. Section 101 of the bill sets out an amended version of 18 U.S.C. 1963 which retains the current penalties of fine and imprisonment, but which would expand and clarify certain aspects of the existing criminal forfeiture provisions.

Proposed section 1963(a).—As amended by section 101, section 1963(a) would set out the penalties for a violation of 18 U.S.C. 1962. Paragraph (1) carries forward the current penalties of up to a \$25,000 fine or twenty years' imprisonment, or both. Paragraph (2) provides for the sanction of criminal forfeiture, and the types of property which are to be forfeited upon a defendant's conviction of a RICO violation are described in subparagraphs (A), (B), and (C). Current 18 U.S.C. 1963(a) provides that upon conviction for a violation of the RICO statute, a defendant shall forfeit to the United States:

"... (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or other contractual right . . . affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962."

It has been the government's position that an "interest . . . acquired or maintained in violation of section 1962" as described in 18 U.S.C. 1963(a)(1) includes the profits or proceeds of the racketeering activities proscribed by the RICO statute. However, the courts that have directly addressed this issue to date have not agreed with this position, but have instead interpreted the term "interest" to mean a continuing, proprietary interest in an enterprise.⁶ The result of such decisions is that the profits generated by racketeering activity generally are not subject to forfeiture under RICO unless reinvested in the enterprise or used to acquire or control another enterprise.

The inability to reach directly the profits generated by racketeering has severely restricted the effectiveness of the RICO forfeiture provisions. Illegitimate enterprises encompassed by the RICO statute rarely have any significant forfeitable assets other than the profits generated by illegal activities. In addition, when legitimate businesses come under the control of racketeers, their assets are commonly bled until the company goes bankrupt, leaving little in the way of a forfeitable interest in the company within the prevailing restrictive court interpretations of 18 U.S.C. 1963(a)(1).

The purported purpose of the RICO forfeiture provisions is to separate racketeers from their sources of economic power. But without the authority to reach the ill-gotten profits of racketeering,

tor Biden relative to the disposition of forfeitable property, use of forfeitable property for the benefit of the defendant, judicial review of mitigation and remission determinations, and a presumption that particular property is forfeitable.

⁶ See *United States v. Marubeni America Corp.*, 611 F.2d 763 (9th cir. 1980); *United States v. Thevis*, 747 F. Supp. 134 (N.D. Ga. 1979).

this goal cannot be realized. The anomalous result of excluding racketeering proceeds from the scope of the RICO forfeiture statute was well illustrated in *Martino*.⁷ Following conviction for the conduct of an arson-for-profit scheme, Martino and two other defendants were ordered to forfeit the insurance proceeds they had obtained from the burning of their properties, and Martino was also ordered to forfeit his interests in two companies through which the scheme was financed. A panel of the Fifth Circuit affirmed the order of forfeiture of Martino's interest in the two companies, but vacated that part of the district court's order concerning the forfeiture of the insurance proceeds, which totalled more than \$300,000. The panel's rationale was that was that the proceeds did not constitute an interest "in an enterprise," and thus were not subject to forfeiture under the RICO statute. The Fifth Circuit has since ordered an *en banc* rehearing on the issue of the forfeitability of the insurance proceeds.

The government's inability to reach the gain produced through racketeering, such as the insurance proceeds in the *Martino* case, has seriously limited the intended utility of the RICO forfeiture sanction. To cure this problem section 1963(a), as amended by section 101 of the bill, specifically provides in the description of property subject to criminal forfeiture, which is set out in paragraph (2), for the forfeiture of racketeering proceeds.

The types of property subject to forfeiture under the bill's amended 18 U.S.C. 1963 (a)(2) are of three kinds. The first two, described in subparagraphs (A) and (B), are essentially the same as the two types of property considered subject to forfeiture under case law interpretations of current 18 U.S.C. 1963(a) (1) and (2): interests in enterprises acquired or conducted in violation of the RICO statute and interests through which enterprises are influenced or controlled. The bill's description of these two types of property are somewhat more detailed than those in current law to avoid problems of limiting construction. For example, subparagraph (A) includes not only interests in, but also contributions to, enterprises to make it clear that property which the defendant contributes to an enterprise conducted in violation of the RICO statute is subject to forfeiture, regardless of whether it gives rise to a legally cognizable interest, such as a partnership or equity interest, in the enterprise itself. This provision would be particularly helpful in cases involving criminal enterprises or groups "associated in fact," where contributed property would not give rise to such an interest.

Subparagraph (C) is the new provision specifying the forfeiture of proceeds of racketeering activity. To come within the scope of this provision, the property must constitute, or be derived from, proceeds the defendant obtained through the racketeering activity or unlawful debt collection involved in the RICO violation. It is important to note that these proceeds must be derived from racketeering activity, and that as a result they will not necessarily constitute all the proceeds of an enterprise involved in the RICO violation. Thus, for example, if only a part of a corporation's affairs were conducted through a pattern of racketeering activity, the gain produced through this activity would be subject to forfeiture under subpara-

⁷ *United States v. Martino*, *supra* note 3.

graph (C), but the legitimately produced profits of the corporation would not.

In subparagraph (C), the term "proceeds" has been used in lieu of the term "profits" in order to alleviate the unreasonable burden on the government of proving net profits. It should not be necessary for the prosecutor to prove what the defendant's overhead expenses were.⁸

Like current law, proposed 18 U.S.C. 1963(a)(2) states that the defendant "shall forfeit" the described property interests, and the final sentence of subsection (a) emphasizes the mandatory nature of forfeiture, requiring the court to order forfeiture in addition to any other penalty imposed. This is in accord with case law holding the provisions of the present RICO statute to be mandatory on the trial court.⁹

Subsection (b) of the bill, amending 18 U.S.C. 1963, simply emphasizes that property subject to criminal forfeiture under the RICO statute may be either real property or tangible or intangible personal property. The types of property described in subparagraphs (A), (B), and (C) are examples of kinds of personal property that may, in a RICO case, be subject to forfeiture and fall generally into the categories of positions or offices used or acquired in the offense,¹⁰ any compensation or benefit derived from such a position or office, and the proceeds of contracts awarded or performed through racketeering.

In essence, the purpose of this subsection is to underscore an intent that the concept of "property", as used in section 1963, is to be broadly construed. It should be noted that although the examples of forfeitable property described in subparagraphs (A), (B), and (C) of subsection (b)(2) parallel the language used in proposed section 1963(a), it is section 1963(a) which is to control when the finder of fact makes a determination of whether particular property is subject to forfeiture.

Proposed Section 1963(c).—Subsection (c) of 18 U.S.C. 1963, as amended by the bill, is a codification of the "taint" theory which has long been recognized in forfeiture cases.¹¹ Under this theory, forfeiture relates back to the time of the acts which give rise to the forfeiture. From that time forward, the property is tainted and remains subject to forfeiture regardless of any subsequent transfer. Absent application of such a principle, a defendant could attempt to avoid forfeiture by transferring his property to another person prior to conviction.¹²

⁸ In *United States v. Jeffers*, 532 F.2d 1101, 1117 (7th Cir. 1976), *aff'd* in part, vacated in part, *Jeffers v. United States*, 432 U.S. 137 (1977), the court took notice of the "extreme difficulty in this conspiratorial, criminal area of finding hard evidence of net profits".

⁹ See *United States v. L'Hoste*, 609 F.2d 796 (5th Cir. 1980), cert. denied, 449 U.S. 1022 (1980).

¹⁰ See *United States v. Rubin*, 559 F.2d 975 (5th Cir. 1977), vacated and remanded on other grounds, 439 U.S. 810 (1978), where the defendant was convicted on RICO and other charges arising out of his embezzlement of union and employee welfare benefit plan funds and was ordered to forfeit his various union and benefit plan offices.

¹¹ See, e.g., *United States v. Simons*, 541 F.2d 1351, 1352 (9th Cir. 1976), citing *United States v. Stolwell*, 133 U.S. 1 (1890).

¹² This result was not permitted in *United States v. Long*, 654 F.2d 911 (3d Cir. 1981), in which it was held that property derived from proceeds of a violation of 21 U.S.C. 848 could be subject to forfeiture although transferred to the defendant's attorneys more than six months prior to indictment, and that an order restraining the attorneys from transferring or selling the property was properly entered.

In testimony before the Committee, the Department of Justice indicated that such transfers are frequently made to relatives or associates of the defendant and the consideration paid for the the property, if any, is minimal.¹³ Of course, there may be instances where the third party is an innocent *bona fide* purchaser of the property for value. Such circumstances, while they should not, consistent with existing precedent, serve to bar the government's forfeiture action, should generally be the basis for the granting of the third party's petition for remission or mitigation of the forfeiture. Thus, subsection (c) provides that the Attorney General shall not direct disposition of such property if the transferee establishes that (1) he was a *bona fide* purchaser of the property for value and (2) he was reasonably without cause to believe that the property was subject to forfeiture. Application of this provision will allow innocent third party purchasers an opportunity to stay disposition of property ordered forfeited and thus preserve a meaningful opportunity to obtain remission or mitigation.

Proposed Section 1963(d).—Subsection (d) of the bill's amended RICO forfeiture provision is new to the law, and authorizes the court to order the defendant to forfeit substitute assets when the property originally subject to forfeiture is no longer available at the time of conviction. This subsection authorizes forfeiture of substitute assets in five circumstances: where property found subject to forfeiture under section 1963(a)(2), as amended by the bill, (1) cannot be located; (2) has been transferred to or deposited with a third party;¹⁴ (3) has been placed beyond the jurisdiction of the court; (4) has been substantially diminished in value by the defendant;¹⁵ or (5) has been commingled with other property which cannot be divided without difficulty. The amount of substitute assets which may be forfeited under this subsection is limited to the value of property described in subsection (a)(2) that is unavailable.¹⁶

The authority to reach substitute assets provided by this subsection should be distinguished from the somewhat different existing practice of "tracing" forfeitable assets. For example, under the CCE statute, which provides for criminal forfeiture of drug profits, the government may, through "tracing", obtain forfeiture of real property purchased with such profits. The substitute assets provision of this subsection would come into play when tracing is impossible or difficult, or where there has been no exchange of properties but rather removal or concealment of the property.¹⁷

¹³ Hearings on S. 2320 before the Committee on the Judiciary, April 23, 1982 (testimony of Jeffrey Harris, Deputy Associate Attorney General).

¹⁴ The authority to order the forfeiture of substitute assets must be understood in conjunction with subsection (c) which voids third party transfers. This provision does not authorize the government to obtain forfeiture both of the transferred property and of substitute assets. Instead, it permits the government to reach substitute assets where the property cannot be reached once it has been transferred or where such action is a preferable alternative to seizure of property that has been sold to an innocent purchaser.

¹⁵ This provision will be of utility where a defendant substantially depletes a forfeitable asset in anticipation of its being ordered forfeited. It is phrased, however, so that it will not apply where the value of property has been subject to minimal or ordinary depreciation.

¹⁶ Substitute assets provisions were also included in S. 1126 and in the forfeiture provisions of S. 1630, the criminal code revision bill reported by the Committee (S. Rept. No. 97-307, 97th Cong., 1st Sess. (1981)).

¹⁷ There may be little distinction between tracing and forfeiture of substitute assets, however, where the forfeited property is a fungible asset such as money.

Proposed Section 1963(e).—Subsection (e) is a modified version of current 18 U.S.C. 1963(b) defining the discretionary authority of the courts to enter restraining orders or injunctions, or to require the execution of performance bonds so as to preserve the availability of forfeitable property pending disposition of the criminal case. Such authority currently exists under both 18 U.S.C. 1963 and 21 U.S.C. 848, but may not be invoked until the defendant has been formally charged.

It is not infrequent that a defendant becomes aware that he is the target of a criminal investigation before the time that he is formally charged. Indeed, most complex criminal cases, such as RICO cases and drug trafficking conspiracies, are preceded by a grand jury investigation, and it is current Department of Justice policy generally to notify the subjects of a grand jury investigation so that they may have an opportunity to appear before the grand jury. Thus, whether through formal notice of an ongoing grand jury investigation or through other means, it is often the case that defendants become aware of the government's development of a case against them and as a consequence have both the incentive and opportunity to move to transfer or conceal forfeitable assets before the jurisdiction of the courts to enter appropriate restraining orders may be invoked.

To address this problem, subsection (e), in addition to carrying forward current restraining order authority in paragraph (1)(A), provides, in paragraph (1)(B), that the court may, upon application of the government, enter an appropriate order to preserve the availability of the property prior to the filing of an indictment or information if it determines, first, that there is probable cause to believe the property is subject to forfeiture under the RICO statute,¹⁸ and second, that the party or parties against whom the order is to be entered have not demonstrated that entry of the order would work an irreparable and substantial harm that would, on balance, outweigh the need to preserve the availability of the property pending prosecution of the criminal case. A pre-indictment restraining order entered under subsection (e)(1)(B) would be limited to a term of ninety days unless extended for good cause or unless an indictment or information were filed.

The sole purpose of the bill's restraining order provision, like that in the current RICO and CCE statutes, is to preserve the status quo, i.e., to assure the availability of the property pending disposition of the criminal case. Nonetheless, in at least three cases, defendants have argued with mixed results that entry of a restraining order was impermissible in that it was inconsistent with the presumption of innocence.¹⁹ In the Committee's view, the

¹⁸Since an order of criminal forfeiture is triggered only by conviction, this determination must include a finding of probable cause concerning the underlying offense as well as probable cause to believe that the subject property is forfeitable property as described in proposed section 1963(a)(2). It should also be noted that the restraining order provision applies only to (a)(2) property. It may not be applied with respect to other assets that may ultimately be ordered forfeited under the substitute assets provision.

¹⁹See *United States v. Scalizitti*, 408 F. Supp. 1014, 1015 (W.D. Pa. 1975) and *United States v. Bello*, 470 F. Supp. 723, 724-725 (S.D. Cal. 1979) (defendant was not more stripped of the presumption of innocence by a restraining order than would be the case were he required to post bond); but see *United States v. Mandel*, 408 F. Supp. 679, 682-684 (D. Md. 1976). The presumption of innocence is an evidentiary standard applied in criminal trials. It does not serve as a substantive bar to any interference with a defendant's interests prior to an adjudication of guilt. *Bell v. Wolfish*, 441 U.S. 520, 533 (1979).

availability of restraining orders is essential in the area of criminal forfeiture and pretrial restraining orders for the purpose of preserving assets does not impinge on the trial concept of a presumption of innocence.

Subsection (e)(2) addresses the situation in which it is necessary for the government to seek the initial entry of a restraining order in an *ex parte* proceeding. Certain types of property, particularly the highly liquid assets forfeitable as profits and proceeds of drug trafficking or certain fraud schemes, may be easily moved, concealed, or disposed of even in the relatively short period of time that may elapse between the giving of notice and the holding of an adversary hearing concerning the entry of restraining order. In such situations, Federal prosecutors have in certain cases found it necessary and prudent to seek an *ex parte* order pending the conduct of a full hearing. Indeed, the Justice Department's manual on criminal forfeiture advises that notice not be given if it would allow the defendant to transfer his assets before a restraining order can be issued, noting that the defendant may then move the court to modify or remove the order.²⁰

The permissibility of the postponement of notice and hearings until after the initial entry of a restraining order in a criminal forfeiture case has not been squarely considered by the courts. However, this issue was addressed with respect to the more intrusive action of *seizure* in the context of civil forfeiture. In *Calero-Toledo v. Pearson Yacht Leasing Co.*,²¹ a yacht on which marihuana was found was seized, pursuant to a civil forfeiture statute, without prior notice or adversary hearing. A three judge district court, relying primarily on a 1972 Supreme Court case,²² held that the failure of the forfeiture statute to provide for pre-seizure notice and hearing rendered it unconstitutional. The Supreme Court reversed, holding that immediate seizure of a property interest, without an opportunity for a prior hearing, was permitted in limited circumstances, and these circumstances were presented in the seizure statute served a significant governmental purpose, i.e., preventing continued criminal use of the property and enforcing criminal sanctions; second, that prior notice might frustrate the purposes of the statute, since the property could be removed, concealed, or destroyed if advance warning of the seizure were given; and third, unlike the situation in *Fuentes*, the seizure was not initiated by self-interested private parties, but rather by government officials. Since these considerations are also present where the government seeks simply to restrain the transfer or disposition of property that may be subject to criminal forfeiture, it seems clear that some postponement of notice and hearing is permitted.

Under subsection (e)(2) the court may enter a temporary restraining order without notice to the defendant or other adverse parties if it determines both of the following. First, either an indictment or information charging a RICO offense and alleging that the property is subject to criminal forfeiture must have been filed,

²⁰ United States Department of Justice, "Criminal Forfeitures under RICO and Continuing Criminal Enterprise Statutes", note 17, November 1980.

²¹ 416 U.S. 663 (1974).

²² *Fuentes v. Shevin*, 407 U.S. 67 (1972).

or the court must make its own probable cause determination to the same effect. Second, the court must find that the nature of the property is such that, if notice were given, the property could be disposed of, concealed, or removed from the jurisdiction of the court before an order pursuant to an adversary hearing could be entered. This second determination is in essence a finding of the exigency compelling the postponement of notice and an adversary hearing.

Of course, entry of a temporary order pursuant to subsection (e)(2) is to be followed by notice to the adverse party of the action taken and a prompt opportunity within the limits set by the statute for a hearing and disposition under subsection (e)(1). Implicit in the statutory scheme is that if the adverse party cannot be located and given notice or does not ask the court for a hearing within the time limits, the court may proceed to a decision on a permanent order. If, for example, after entry of the *ex parte* order and compliance with efforts to appropriately notify any adverse parties, no party responds to call for a hearing, such as where the adverse party is a fugitive or does not desire to assert any connection with the property, the court may proceed to enter an order under subsection (e)(1).

Proposed Section 1963(f).—Subsection (f) of 18 U.S.C. 1963, as amended by the bill, governs matters arising during the period from the entry of the order of forfeiture until the time that the Attorney General directs disposition of the property. While this subsection addresses a number of issues, these provisions have been formulated to retain a degree of flexibility. Particularly in RICO cases, where forfeited property may include ongoing businesses, such flexibility is a necessity.

As is provided in current 18 U.S.C. 1963(c), upon conviction of the defendant to court is to enter a judgment of forfeiture²³ and authorize the attorney general to seize the property upon such terms and conditions as the court shall deem proper.²⁴ The authority of the court to set such terms and conditions is not to extend, however, to permitting the application of the forfeited property to offset expenses or obligations of the defendant.

After entry of the order of forfeiture, it may be necessary to obtain an accurate accounting of the property, and the property may continue to be vulnerable to depletion or transfer if it is not immediately seized. Thus, subsection (f) provides that the court may appoint receivers or trustees and may enter appropriate restraining orders. Subsection (f) also permits the use of income accruing to or derived from an enterprise to offset ordinary and necessary expenses of the enterprise that are legally required or which are necessary to protect the interests of the United States or third parties. Thus, the value of an enterprise may be preserved until it is disposed of.

Proposed Section 1963(g).—Subsection (g) concerns matters regarding the disposition of property. Following the seizure of the

²³ When an indictment or information alleges that property is subject to criminal forfeiture, a special verdict must be returned as to the extent of the property subject to forfeiture. Rule 31 of the Federal rules of Criminal Procedure.

²⁴ This is also the procedure mandated under Rule 32 of the Federal Rules of Criminal Procedure.

property, the Attorney General is authorized to direct its disposal by sale or other commercially feasible means, making due provision for the rights of any innocent persons. As in current law, this subsection provides that an interest that is not exercisable by, or transferable for value too, the United States, shall expire and shall not revert to the defendant. However, unlike current law, subsection (g) would specifically prohibit reacquisition by the defendant of property he has forfeited.

Since, under current practice, third parties who may have an interest in, or may be affected by, property which is the subject of criminal forfeiture may not intervene in the criminal case, and are required to exhaust their administrative remedies—principles set out in subsection (j)—subsection (g) authorizes the court to stay disposition of the property pending conclusion of any appeal of the criminal case, if the third party demonstrates that the disposition of the property will result in irreparable injury, harm, or loss to him.

Once the property has been disposed of, the proceeds are to be used to pay the expenses of the forfeiture and sale, including costs arising from the seizure, maintenance, and custody of the property. The remaining amounts are to be deposited in the general fund of the Treasury.

Proposed Section 1963(h).—Subsection (h) of 18 U.S.C. 1963, as amended by the bill, sets forth several aspects of the authority of the Attorney General with respect to property that has been ordered forfeited. This authority is in essence carried forward from existing law, although in a more straightforward manner. Under 18 U.S.C. 1961, the Attorney General may designate other officials to exercise this authority or any other powers conferred upon him by the RICO statute. The authority described in subsection (h) includes: (1) granting petitions for remission or mitigation of forfeiture, restoring forfeited property to victims, and taking other actions to protect the rights of innocent persons; (2) compromising claims; (3) awarding compensation to persons providing information that led to a forfeiture; (4) directing the disposition, by the United States, of the property; and (5) taking measures to protect and maintain the property pending its disposition.

Proposed Section 1963(i).—In current 18 U.S.C. 1963(c), the procedures for disposition of the forfeited property, for consideration of petitions for remission and mitigation of forfeiture, and for other post-seizure matters are governed by the customs laws. In some respects, however, these customs laws provisions have been found not adequate to address some of the particularly complex issues that arise in RICO forfeiture cases. Subsection (i), therefore, requires the development and promulgation of regulations to govern certain post-seizure matters. These regulations may be drafted to address some of the unique problems that arise in RICO forfeitures. Pending the promulgation of these regulations, the currently applicable provisions of the customs laws would remain in effect.

Proposed Section 1963(j).—Subsection (j) of the RICO forfeiture provision, as amended by the bill, sets forth currently recognized limitations on the commencement of legal actions by third parties claiming an interest in property subject to criminal forfeiture. First, third parties are barred from intervening in the criminal

case. Second, third parties must await the completion of any appeal of the criminal conviction and the consideration by the Attorney General of petitions for remission and mitigation of forfeiture before filing a suit asserting a claim to the property. This second provision carries forward the principle that a third party must exhaust the administrative remedy of filing a petition for remission or mitigation of forfeiture before seeking judicial review.²⁵ The claims of most innocent third parties (most legitimate third party claimants are persons with liens against forfeited property) can be satisfactorily addressed in this administrative process, so that litigation may be avoided. Furthermore, proposed section 1963(c) and 1963(g) both provide an avenue for third parties to stay disposition of property in which they claim an interest so that they may effectively avail themselves of these administrative remedies.

Proposed Section 1963(k).—This provision of the bill simply emphasizes the jurisdiction of the court to enter orders under these criminal forfeiture provisions, without regard to the location of the property. This principle is one of the distinctions between civil and criminal forfeiture, because in civil forfeitures the power of the court extends only to property within the district in which it is located.

Proposed Section 1963(z).—Subsection (z) of section 1963, as amended by the bill, authorizes the court to order the taking of depositions to facilitate the identification and location of property that has been declared forfeited and the disposition of petitions for remission or mitigation of forfeiture. The taking of such depositions will provide for a more orderly and fair consideration of these matters and will permit the development of a more complete record.

PART B

AMENDMENTS TO THE COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970

Part B of the bill amends the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 *et seq.*). Section 201 of the bill sets out a new generally applicable criminal forfeiture statute for all felony violations of the Act. Currently, the sole offense under the Act for which the sanction of criminal forfeiture is available is a violation of the Continuing Criminal Enterprise statute (21 U.S.C. 848), and only an extremely small number of drug trafficking cases are prosecuted under this section. Section 204 of the bill amends certain aspects of the civil forfeiture provision of the Act, which is set out at 21 U.S.C. 881, to facilitate civil forfeitures.²⁶ Most of the remaining amendments in Part B of the bill are minor clarifying or conforming amendments.

Section 201—Criminal Forfeiture for All Felony Drug Offenses

Section 201 creates a new generally applicable criminal forfeiture statute for all felony violations of Title II and III of the Comprehensive Drug Abuse Prevention and Control Act. These viola-

²⁵ See *United States v. Mandel*, 505 F. Supp. 189 (D. Md. 1981).

²⁶ 21 U.S.C. 881 also governs certain matters arising from criminal forfeitures under 21 U.S.C. 848.

tions represent the most serious drug offenses. Currently, the CCE statute (21 U.S.C. 848), which punishes those who control a group of five or more persons who are engaged in continuing drug related crimes, is the sole provision of title 21, United States Code, that provides for the sanction of criminal forfeiture. However, the civil forfeiture provisions of title 21²⁷ are quite broad and permit the forfeiture of a variety of property used in drug offenses, including the proceeds of drug transactions. Nonetheless, there are certain drawbacks to civil forfeiture that could be avoided if the prosecutors had the option of seeking criminal forfeiture in all major drug cases.

Civil forfeiture is an *in rem* proceeding against the property itself, and thus a separate civil action must be filed in each district in which the property is located. In cases of large drug trafficking operations, forfeitable property may be located in several districts. Thus separate but parallel civil actions must be filed in each district in which such property is located. Criminal forfeiture, on the other hand, is an *in personam* action, and therefore the jurisdiction of the court to enter orders affecting property subject to criminal forfeiture is not limited to property within the district in which the criminal case is tried.

Where the issues relating to civil forfeiture are the same as or closely related to those that will arise in the prosecution of a drug offense, it is a waste of valuable judicial and prosecutive resources to require separate civil forfeiture proceedings against property of the defendant even though the evidence presented in the criminal case will be largely dispositive of the civil forfeiture action. The forfeiture of more significant amounts of drug-related property would more likely be achieved if the judge and jury considering the criminal case were also permitted to determine the forfeiture issue, and the prosecutor and investigators who have prepared the criminal case can more readily apply their energy and expertise to an aggressive pursuit of criminal forfeiture.

Thus, a more efficient mechanism for achieving the forfeiture of a defendant's proceeds from his drug trafficking or of other property he has used in the offense is to permit the criminal forfeiture of such property and thereby consolidate the forfeiture action with the criminal prosecution. Section 201 creates such a mechanism, and each of the subsections of this new generally applicable criminal forfeiture statute for major drug offenses are discussed in detail below. To the greatest extent possible, the provisions of the title 21 criminal forfeiture statute set out in section 201 of the bill parallel those of the amended RICO criminal forfeiture provisions set out in section 101.

The new criminal forfeiture statute created in section 201 of the bill is to appear as section 413 of the Comprehensive Drug Abuse Prevention and Control Act. This statute is divided into the following subsections:

Subsection (2)—Property subject to criminal forfeiture.—Subsection (a) specifies for which drug offenses the criminal forfeiture sanction is to be applicable, and describes the property that is subject to forfeiture. Criminal forfeiture is to apply to all felony viola-

²⁷ 21 U.S.C. 881.

tions of Titles II and III of the Act.²⁸ The types of property which are to be subject to and order of criminal forfeiture are described in paragraphs (1), (2), and (3) of subsection (a). The first category of property is that which constitutes or is derived from the proceeds the defendant obtained as a result of the violation for which he was convicted. The same type of property is now subject to civil forfeiture under 21 U.S.C. 881(a)(6). The reasons for using the term "proceeds" to define this type of property were discussed *supra* in the context of the amendments to the RICO criminal forfeiture provisions. The type of property which is subject to criminal forfeiture under paragraph (2) is that which is "used, or intended to be used . . . to commit, or to facilitate the commission of" the offense for which the defendant was convicted. This is generally the manner in which property subject to civil forfeiture is defined in 21 U.S.C. 881, although section 881 refers to specific types of property such as vehicles, records, containers, and equipment. Subsection (a)(2) of the bill's criminal forfeiture statute, on the other hand, refers simply to "property" used in the violation.

The description of property subject to criminal forfeiture which is set out in subsection (a)(3) carries forward that portion of the present CCE statute which authorizes the forfeiture of interests in, or which afford a source of control over, a continuing criminal enterprise.²⁹

Subsection (a) also emphasizes that the entry of an order of forfeiture is mandatory following conviction. The mandatory nature of criminal forfeiture was discussed *supra* in the context of the RICO forfeiture amendments.

Subsection (b)—Meaning of term "property."—Like 18 U.S.C. 1963(b), as amended in section 101 of the bill, this subsection of the narcotics criminal forfeiture statute makes it clear that property subject to criminal forfeiture may be real property and tangible or intangible personal property. The specific examples of forfeitable property that were included in the RICO amendments are not included in this provision since the forfeiture of such property interests as offices, positions, and contract proceeds would be the more likely result in a RICO prosecution than in a prosecution of a narcotics offense.

Subsection (c)—Third party transfers.—Subsection (c) preserves the ability of the United States to obtain forfeiture of property the defendant has used in, or acquired as a result of, a narcotics viola-

²⁸ The felony offenses under Titles II and III of the Comprehensive Drug Abuse Prevention and Control Act are violations of: 21 U.S.C. 841 (except first offenses involving Schedule V substances and distribution of small amounts of marijuana for no remuneration); 21 U.S.C. 842 (in cases of repeat violations of certain more serious regulatory offenses); 21 U.S.C. 843 (which addresses knowing and intentional violations concerning fraud and offenses involving counterfeit substances, and also the use of communications facilities in committing felonies under the Act); 21 U.S.C. 844(a) (second offense of possession); 21 U.S.C. 845 (providing special penalties for distribution to persons under 21); 21 U.S.C. 846 (attempt and conspiracy where the underlying offense was a felony); 21 U.S.C. 848 (continuing criminal enterprise); 21 U.S.C. 952 (importation of controlled substances); 21 U.S.C. 953 (exportation of controlled substances); 21 U.S.C. 955 (possession of Schedule I or II or narcotic drugs on board vessels arriving in or departing the United States); 21 U.S.C. 955a (manufacture, distribution, or possession with intent to manufacture or distribute controlled substances on board vessels); 21 U.S.C. 955c (attempt or conspiracy to commit a violation of 21 U.S.C. 955a); 21 U.S.C. 957 (export and import by certain non-registrants); 21 U.S.C. 959 (manufacture or distribution for purposes of unlawful importation); 21 U.S.C. 963 (attempt or conspiracy to commit felony importation offenses of Title III of the Act).

²⁹ The separate criminal forfeiture provisions of 21 U.S.C. 848 are repealed in section 203 of the bill.

tion even though the defendant has subsequently transferred it to another. The same provision is included in the RICO amendments of section 101 of the bill, and is discussed fully in the portion of the analysis of section 101 that refers to proposed 18 U.S.C. 1963(c).

Subsection (d)—Substitute Assets.—Subsection (d) sets out the same provision authorizing the forfeiture of substitute assets of the defendant as is included in the RICO forfeiture amendments in section 101 of the bill. For a discussion of this provision, see the analysis of proposed 18 U.S.C. 1963(d) *supra*.

Subsection (e)—Presumption of forfeitability.—The extremely lucrative nature of drug trafficking is well established, and indeed is a primary reason why the forfeiture of the proceeds of drug transactions is necessary to effectively deter and punish such conduct. However, it is often difficult to produce direct evidence that particular property of a defendant constitutes, or was purchased with, such proceeds. There are certain circumstances which are indicative of the fact that particular property does represent such proceeds. The purpose of subsection (e) is to establish a permissive inference that property is subject to forfeiture when such circumstances are established.

In order to invoke the inference set out in subsection (e) that particular property is subject to criminal forfeiture under the proposed narcotics forfeiture statute of section 201 of the bill, two elements must be established by the government. First, the defendant must have acquired the property during, or within a reasonably related time after, the period during which he committed the violation for which he was convicted. Second, the defendant's apparent sources of legal income must be insufficient to account for his acquisition of the property. This second element is akin to the familiar "net worth" method of proof commonly used in tax cases. Once these factors are established, the trier of fact may then conclude that the property is subject to criminal forfeiture. This conclusion is not, however, compelled, and the trier of fact may reject application of the presumption, or more accurately, the inference, set out in subsection (a) if it is not merited under the facts of the case or in light of evidence produced by the defendant which would bring into question its validity if it were applied.

Framed as a permissive and rebuttable inference rather than a mandatory presumption, the presumption in subsection (e) would appear to meet constitutional requirements.³⁰

Subsection (f)—Protective orders.—Subsection (f) authorizes the court to enter appropriate restraining orders and injunctions, require the execution of performance bonds, and take other actions to protect the availability of property that may be subject to criminal forfeiture. This authority is the same as that provided in the analogous provision of the amendments to the RICO forfeiture provisions. For a discussion of this protective order provision, see the analysis *supra* of 18 U.S.C. 1963(e).

Subsection (g)—Warrant of seizure.—This subsection of the new criminal forfeiture statute set out in section 201, authorizes the court to issue a warrant of seizure, based upon a probable cause showing, if it further determines that a protective order issued

³⁰ See *Ulster County Court v. Allen*, 442 U.S. 140 (1979).

under subsection (f) would not be sufficient to assure the availability of the property for forfeiture. The types of property subject to forfeiture in narcotics cases are often in forms that are easily moved or concealed, or are highly liquid. With respect to this type of property, entry of a restraining order may not be adequate to assure that the property will be available in the event the defendant is convicted. In such cases, it may be necessary for the government to seize the property and either take custody of it or transfer custody to the court.

Subsection (h)—Execution.—This subsection, which deals with matters after the entry of the order of forfeiture up to the time that the property is to be disposed of, corresponds to proposed 18 U.S.C. 1963(f) as set out in section 101 of the bill. Therefore the analysis of that provision should be referred to with respect to this subsection.

Subsection (i)—Disposition of property.—Subsection (i), which deals with matters concerning the disposition of property that has been ordered forfeited, corresponds to proposed 18 U.S.C. 1963(g) as set out in section 101 of the bill. Again, the analysis of that portion of the amended RICO forfeiture provision applies to this subsection.

Subsection (j)—Authority of the Attorney General.—This subsection, like the analogous provision of the amended RICO forfeiture provision set out in section 101 of the bill, enumerates the authority of the Attorney General ³¹ with respect to certain matters concerning forfeited property. These powers include granting petitions for remission or mitigation of forfeiture and taking other actions to protect the interests of innocent persons, compromising claims concerning forfeited property, making awards of compensation, directing disposition of forfeited property by the United States,³² and taking appropriate measures to maintain and safeguard forfeited property pending its disposition.

Subsection (k)—Applicability of civil forfeiture provisions.—Subsection (k) provides that, except to the extent that they are inconsistent with provisions of the proposed criminal forfeiture statute set out in section 201 of the bill, the provisions of 21 U.S.C. 881(d) are to apply to criminal forfeitures under the proposed statute. The provisions of 21 U.S.C. 881(d) state that such matters as the disposition of forfeited property and proceeds from the sale thereof, the remission and mitigation of forfeitures, and the compromise of claims arising out of forfeiture actions are to be governed by the analogous provisions of the customs laws. Currently, these aspects of the customs laws apply both to civil forfeitures under 21 U.S.C. 881(a) and criminal forfeitures under the CCE statute (21 U.S.C. 848).

Subsection (l)—Bar on intervention; exhaustion of administrative remedies.—Subsection (l) sets forth the same bar on intervention by third parties in a trial or appeal of the criminal case giving rise to the forfeiture and on the commencement of civil suits by such par-

³¹ As authorized in 21 U.S.C. 871, all functions vested in the Attorney General under the Comprehensive Drug Abuse Prevention and Control Act of 1970 have been delegated to the Drug Enforcement Administration by regulation. See 28 C.F.R. 0.100(b).

³² Disposition of forfeited property is to be governed by 21 U.S.C. 881(e).

ties prior to exhaustion of the administrative remedy of filing a petition for remission or mitigation of forfeiture that is included in the RICO forfeiture provisions of section 101. See the analysis of 18 U.S.C. 1963(j) in the discussion of section 101 *supra*.

Subsection (m)—Jurisdiction to enter orders.—Like subsection (k) of the bill's proposed amendment of the RICO forfeiture provision, this subsection simply emphasizes that the court may enter orders in a criminal forfeiture case without regard to the location of the property that may be subject to criminal forfeiture or that has been ordered criminally forfeited.

Subsection (n)—Depositions.—This subsection authorizes the court to order the taking of depositions to facilitate the location and identification of property that has been ordered criminally forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture. The same language appears as the final subsection of the proposed revision of the RICO forfeiture provisions in section 101 of the bill. See the analysis of proposed 18 U.S.C. 1963(l) *supra*. This authority supplements the authority to take testimony regarding petitions for remission or mitigation of forfeiture now set out in 19 U.S.C. 1618.

Section 202

21 U.S.C. 824(f) provides for the forfeiture of controlled substances that are held by a distributor, dispenser, or manufacturer of controlled substances whose registration has been revoked. This amendment to 21 U.S.C. 824(f) simply codifies the "taint" theory discussed *supra*. The principle that the interest of the United States in forfeited property vests at the time of the acts giving rise to the forfeiture is well established in the context of civil forfeitures.

Section 203

Section 203 of the bill simply deletes the separate criminal forfeiture provisions of the Continuing Criminal Enterprise statute set out at 21 U.S.C. 848. Criminal forfeitures arising out of a violation of the CCE statute are to be governed by the new criminal forfeiture statute set out in section 201 of the bill.

Section 204

Section 204 of the bill amends certain provisions of 21 U.S.C. 881, which provides for the civil forfeiture of a variety of drug-related property, and which also governs certain procedural matters both in civil forfeitures and in criminal forfeitures under the CCE statute.

The first amendment would add to the list of property subject to civil forfeiture set out in section 881(a) real property which is used or intended to be used in a felony violation of the Drug Abuse Prevention and Control Act. This provision would allow the forfeiture of real property which is used for the storage of illicit drugs and for their cultivation. This provision would also include an "innocent owner" exception like that now included in those provisions permitting the civil forfeiture of vehicles and moneys or securities.

The amendments to subsections (b), (c), (d), and (e) of section 881 are essentially technical or conforming amendments. As noted

above, certain of these provisions apply not only to civil forfeitures but to criminal forfeitures under the CCE statute, since these provisions of section 881 refer simply to forfeitures "under this subchapter." To clarify the applicability of these provisions to both civil and criminal forfeitures, appropriate clarifying language has been inserted.

Section 204 also adds two new subsections at the end of section 881. The first provides that all right, title, and interest in property which is subject to civil forfeiture under section 881(a) vests in the United States upon commission of the acts giving rise to the forfeiture. As discussed above, this principle is well established in current law. The Second new subsection to be added to section 881 provides for a stay of civil forfeiture proceedings when the government has commenced a criminal case that involves the criminal forfeiture of the same property. Generally, the courts have been willing to grant such stays of civil forfeiture proceedings when the government has commenced a criminal action concerning the same acts that have given rise to the forfeiture.³³ Absent such a stay, the government may be compelled in the context of the civil forfeiture action to disclose prematurely aspects of its criminal case.

Section 205

Section 205 simply adds a new section at the end of Title III of the Comprehensive Drug Abuse Prevention and Control Act to make it clear that the criminal forfeiture statute proposed in section 201 of the bill, which is to be located in Title II of the Act, applies to felony violations of Title III of the Act as well. Title III of the Act governs offenses concerning the importation and exportation of controlled substances.

Section 206

Section 206 of the bill amends the table of contents of the Comprehensive Drug Abuse Prevention and Control Act of 1970 to reflect the two new section created in sections 201 and 205 of the bill.

PART C

TRIAL PROGRAM FOR PAYMENT OF REWARDS OUT OF PROCEEDS OF FORFEITURES OF DRUG-RELATED PROPERTY

Section 301

Section 301 establishes, for a two-year trial period, a program for the set aside of twenty-five percent of the net amount realized from civil and criminal forfeitures under the Comprehensive Drug Abuse Prevention and Control Act of 1970 which are to be available exclusively for the payment of awards for information or other assistance that has resulted in a forfeiture under the Act. The Drug Enforcement Administration would have the discretion to determine whether such an award was merited in a particular case and set the amount of the award within an upper limit for each

³³ When both civil and criminal proceedings arise out of the same or related transactions, the government is, as a general rule, entitled to a stay of discovery in the civil action until disposition of the criminal matter. See, e.g., *United States v. One 1967 Buick Hardtop Electra*, 304 F. Supp. 1402 (W.D. Pa. 1969), and cases cited therein.

case of the lesser of \$50,000 or twenty-five percent of the proceeds realized by the United States from the forfeiture. Under the program established by section 301, payments could be made to persons other than Federal, State, or local officers or employees, and to entities other than an agency or instrumentality of the United States.

During the two-year trial period, detailed audits of the expenditure of funds under this program are to be made semi-annually.

COST ESTIMATE OF THE CONGRESSIONAL BUDGET OFFICE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., July 13, 1982.

Hon. STROM THURMOND,

Chairman, Committee on the Judiciary, U.S. Senate, Dirksen Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 2320, the Comprehensive Criminal Forfeiture Act of 1982, as ordered reported by the Senate Committee on the Judiciary, June 23, 1982.

S. 2320 is designed to facilitate the forfeiture of property utilized in or obtained through racketeering and major drug-related crimes. The bill clarifies the types of property subject to forfeiture, provides judicial power to issue preindictment protective orders, provides for the consideration and disposition of third-party claims, authorizes the Attorney General to promulgate necessary regulations, and establishes a pilot program setting aside 25 percent of the funds realized through forfeiture under the drug laws for awards relating to obtaining information and assistance to facilitate forfeiture.

Forfeitures realized under the Racketeer Influenced and Corrupt Organization (RICO) and Continuing Criminal Enterprise (CCE) acts since 1970 have totaled about \$2 million. S. 2320 is intended to remedy many of the ambiguities and deficiencies now constraining forfeiture under those two laws. However, because the magnitude of the finances associated with these criminal activities is unknown and because the effort and success of government investigators and prosecutors is impossible to predict, CBO has no basis for estimating the increase in proceeds that might result from enactment. According to information available from the Department of Justice, it is possible that this increase could be on the order of tens of millions of dollars. Similarly, as it is impossible to predict the type and volume of property associated with forfeiture activities, CBO has no basis for estimating the costs of storage, security, and disposition of forfeited property or whether these costs will decline relative to current practices.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

ALICE M. RIVLIN, *Director.*

BEST DOCUMENT AVAILABLE

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REGULATORY IMPACT STATEMENT

In compliance with Rule 26.11b of the Standing Rules of the Senate, the Committee states that it has concluded that the bill will have no regulatory impact.

VOTE OF THE COMMITTEE

In Executive session of the Committee on June 23, 1982, S. 2320, without amendment, was ordered favorably reported to the Senate by voice vote.

CHANGES IN EXISTING LAW

In compliance with rule 26.12 of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in *italic*, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

TITLE 18.—CRIMES AND CRIMINAL PROCEDURE

* * * * *

CHAPTER 96—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

* * * * *

§ 1963. Criminal penalties

[(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than \$25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

[(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

[(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in

respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.】

(a) *Whoever violates any provision of section 1962 of this chapter—*

(1) shall be fined not more than \$25,000 or imprisoned for not more than twenty years, or both; and

(2) shall forfeit to the United States any property, irrespective of any provision of State law—

(A) constituting, or derived from, any interest in or contribution to an enterprise he has acquired, maintained, established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962 of this chapter;

(B) constituting a means by which he has exerted influence or control over any enterprise he has acquired, maintained, established, operated, controlled, conducted, or participated in the acquisition, maintenance, establishment, operation, conduct or control of, in violation of section 1962 of this chapter; and

(C) constituting, or derived from, any proceeds which be obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962 of this chapter.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this section, that he forfeit to the United States all property described in paragraph (2).

(b) Property subject to criminal forfeiture under this section including—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities including, but not limited to—

(A) any position, office, appointment, tenure, commission, or employment contract of any kind which the incumbent acquired or maintained in violation of section 1962 of this chapter, through which the incumbent conducted, or participated in or facilitated the conduct of, the affairs of an enterprise in violation of section 1962 of this chapter, or which afforded the incumbent a source of influence or control over the affairs of an enterprise which was exercised in violation of section 1962 of this chapter;

(B) any compensation, right or benefit derived from a position, office, appointment, tenure, commission, or employment contract described in subparagraph (A) which the incumbent obtained, directly or indirectly, through a pattern of racketeering activity or unlawful debt collection in viola-

tion of section 1962 of this chapter, or which accrued to the incumbent during the period that he controlled, influenced, conducted, or participated in or facilitated the conduct of, the affairs of the enterprise in violation of section 1962 of this chapter; and

(C) any amount payable or paid under any contract for goods or services which was awarded or performed through a pattern of racketeering activity or unlawful debt collection.

(c) All right, title, and interest in property described in subsection (a)(2) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is held in the name of, or possessed by, a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States: Provided, That the Attorney General shall not direct disposition of any such property if the person establishes to the Attorney General by evidence contained in a petition pursuant to subsection (h) that—

(1) he was a bona fide purchaser of the property for value; and

(2) he was reasonably without cause to believe that the property was of the type described in subsection (a)(2).

(d) If any of the property described in subsection (a)(2)—

(1) cannot be located;

(2) has been transferred to, sold to, or deposited with, a third party,

(3) has been placed beyond the jurisdiction of the court,

(4) has been substantially diminished in value by any act or omission of the defendant, or

(5) has been commingled with other property which cannot be divided without difficulty,

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

(e)(1) Upon application of the United States, the court may, after a hearing with respect to which any adverse parties have been given reasonable notice and opportunity to participate, enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a)(2) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if the court determines—

(i) that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that the property is in the possession or control of the party against whom the order is to be entered, and

(ii) that the party against whom the order is to be entered has failed to demonstrate that the entry of the requested order would result in substantial and irreparable harm or injury to him that outweighs the need to preserve the availability of the property through the entry of the requested order:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) Upon application of the United States, a temporary restraining order to preserve the availability of property described in subsection (a)(2) for forfeiture under this section may be granted without notice to the adverse party or his attorney if—

(A) an indictment or information described in paragraph (1)(A) has been filed or if the court determines that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that the property is in the possession or control of the party against whom the order is to be entered; and

(B) the court determines that the nature of the property is such that it can be concealed, disposed of, or placed beyond the jurisdiction of the court before the adverse party may be heard in opposition.

A temporary order granted without notice to the adverse party shall expire within such time, not to exceed ten days, as the court fixes, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. If a temporary restraining order is granted without notice to the adverse party, a hearing concerning the entry of an order under paragraph (1) shall be held at the earliest possible time and prior to the expiration of the temporary order.

(f) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. No property forfeited pursuant to this section may be ordered applied to offset any claims against, or obligations or expenses of, the defendant. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from an enterprise, or an interest in an enterprise, ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(g) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property

right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. The proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall forward to the Treasurer of the United States for deposit in the general fund of the United States Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(h) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

“(1) grant petitions for mitigation, or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this chapter;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(i) The Attorney General shall within one hundred and eighty days of the enactment of this Act promulgate regulations with respect to—

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of

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compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(j) Except as provided in this section, no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property, prior to or during the trial or appeal of the criminal case, or during the period in which any petition for remission or mitigation of forfeiture is pending before the Attorney General.

(k) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(l) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under rule 15 of the Federal Rules of Criminal Procedure.

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TITLE 21—FOOD AND DRUGS

* * * * *

CHAPTER 13—DRUG ABUSE PREVENTION AND CONTROL

* * * * *

PART C—REGISTRATION OF MANUFACTURERS, DISTRIBUTORS, AND DISPENSERS OF CONTROLLED SUBSTANCES

* * * * *

§ 824. Denial, revocation, or suspension of registration

* * * * *

DISPOSITION OF CONTROLLED SUBSTANCES

(f) In the event the Attorney General suspends or revokes a registration granted under section 823 of this title, all controlled substances owned or possessed by the registrant pursuant to such registration at the time of suspension or the effective date of the revocation order, as the case may be, may, in the discretion of the At-

torney General, be placed under seal. No disposition may be made of any controlled substances under seal until the time for taking an appeal has elapsed or until all appeals have been concluded except that a court, upon application therefor, may at any time order the sale of perishable controlled substances. Any such order shall require the deposit of the proceeds of the sale with the court. Upon a revocation order becoming final, all such controlled substances (or proceeds of sale deposited in court) shall be forfeited to the United States; and the Attorney General shall dispose of such controlled substances in accordance with section 881(e) of this title. *All right, title, and interest in such controlled substances shall vest in the United States upon a revocation order becoming final.*

* * * * *

§ 848. Continuing criminal enterprise

PENALTIES; FORFEITURES

(a) **[(1)]** Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than \$100,000, and to the forfeiture prescribed in **[paragraph (2)]** *section 853 of this title*; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than \$200,000, and to the forfeiture prescribed in **[paragraph (2)]** *section 853 of this title*.

[(2)] Any person who is convicted under paragraph (1) of engaging in a continuing criminal enterprise shall forfeit to the United States—

- (A) the profits obtained by him in such enterprise, and
- (B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.]

CONTINUING CRIMINAL ENTERPRISE DEFINED

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

- (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
- (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

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SUSPENSION OF SENTENCE AND PROBATION PROHIBITED

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and the Act of July 15, 1932 (D.C. Code, secs, 24-203 to 24-207), shall not apply.

JURISDICTION OF COURTS

[(d) The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a) of this section) shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper.]

* * * * *

PROHIBITED ACTS A—PENALTIES

* * * * *

CRIMINAL FORFEITURES

Property Subject to Criminal Forfeiture

SEC. 853. (a) Any person convicted of a violation of this title or title III punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds he obtained, directly or indirectly as the result of such violation;

(2) any of this property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, he shall forfeit, in addition to any property described in paragraphs (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this title or title III, that he forfeit to the United States all property described in this subsection.

Meaning of Term "Property"

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims and securities.

Third Party Transfers

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is held in the name of, or possessed by, a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States: Provided, That the Attorney General shall not direct disposition of any such property if the person establishes to the Attorney General by evidence contained in a petition for remission or mitigation of forfeiture that—

(1) he was a bona fide purchaser of the property for value; and

(2) he was reasonably without cause to believe that the property was of the type described in subsection (a)

Substitute Assets

(d) If any of the property described in subsection (a)—

(1) cannot be located,

(2) has been transferred to, sold to, or deposited with a third party,

(3) has been placed beyond the jurisdiction of the court,

(4) has been substantially diminished in value by any act or omission of the defendant, or

(5) has been commingled with other property which cannot be divided without difficulty,

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

Presumption of Forfeitability

(e) Any property of the defendant may be presumed to be property subject to forfeiture under subsection (a) if the trier of fact finds that—

(1) the defendant acquired the property during, or within a reasonable time after, the period during which he committed the violation for which he was convicted; and

(2) the defendant's apparent sources of legal income during such period were substantially insufficient to account for his acquisition of the property.

Protective Orders

(f)(1) Upon application of the United States, the court may, after a hearing with respect to which any adverse parties have been given reasonable notice and opportunity to participate, enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of this title or title III for which criminal forfeiture may be ordered under this section and alleging that the proper-

ty with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if the court determines—

(i) that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that the property is in the possession or control of the party against whom the order is to be entered, and

(ii) that the party against whom the order is to be entered has failed to demonstrate that the entry of the requested order would result in substantial and irreparable harm or injury to him that outweighs the need to preserve the availability of the property through the entry of the requested order:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) Upon application of the United States, a temporary restraining order to preserve the availability of property described in subsection (a) for forfeiture under this section may be granted without notice to the adverse party or his attorney if—

(A) an indictment or information described in paragraph (1)(A) has been filed or if the court determines that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that the property is in the possession or control of the party against whom the order is to be entered; and

(B) the court determines that the nature of the property is such that it can be concealed, disposed of, or placed beyond the jurisdiction of the court before the adverse party may be heard in opposition.

A temporary order granted without notice to the adverse party shall expire within such time, not to exceed ten days, as the court fixes, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. If a temporary restraining order is granted without notice to the adverse party, a hearing concerning the entry of an order under paragraph (1) shall be held at the earliest possible time and prior to the expiration of the temporary order.

Warrant of Seizure

(g) The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (f) may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

Execution

(h) Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. No property forfeited pursuant to this section may be ordered applied to offset any claims against, or obligations or expenses of, the defendant. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

Disposition of Property

(i) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

Authority of the Attorney General

(j) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this chapter;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 881(e) of this title, of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

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(5) take appropriate measures necessary to safeguard and maintain property order forfeited under this section pending its disposition.

Applicability of Civil Forfeiture Provisions

(k) Except to the extent that they are inconsistent with the provision of this section, the provisions of section 881(d) of this title shall apply to criminal forfeiture under the section.

Bar on Intervention; Exhaustion of Administrative Remedies

(l) Except as provided in this section, no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property, prior to or during the trial or appeal of the criminal case, or during the period in which any petition for remission or mitigation of forfeiture is pending before the Attorney General.

Jurisdiction to Enter Orders

(m) The district courts of the United States shall have jurisdiction to enter order as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

Depositions

(n) In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under rule 15 of the Federal Rules Criminal Procedure.

§ 881. Forfeitures

PROPERTY SUBJECT

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

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(3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter; and

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) *All real property, including any appurtenances to or improvements on such property, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.*

SEIZURE PURSUANT TO SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

(b) Any property subject to *civil or criminal* forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

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(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property [has been used or is intended to be used in violation of] *is subject to civil or criminal forfeiture under this subchapter.*

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

CUSTODY OF ATTORNEY GENERAL

(c) Property taken or detained under this section shall not be replevable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under *any of* the provisions of this subchapter, the Attorney General may—

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it, *if practicable*, to an appropriate location for disposition in accordance with law.

OTHER LAWS AND PROCEEDINGS APPLICABLE

(d) The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the mission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

DISPOSITION OF FORFEITED PROPERTY

(e) Whenever property is *civilly or criminally* forfeited under this subchapter the Attorney General may—

(1) retain the property for official use;

(2) sell any forfeited property which is not required to be destroyed by law and which is not harmful to the public;

(3) require that the General Services Administration take custody of the property and [remove it for disposition] and dispose of it in accordance with law; or

(4) forward it to the Drug Enforcement Administration for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General).

The proceeds from any sale under paragraph (2) and any moneys forfeited under this subchapter shall be used to pay all proper expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs. The Attorney General shall forward to the Treasurer of the United States for deposit in the general fund of the United States Treasury any amounts of such moneys and proceeds remaining after payment of such expenses.

FORFEITURE OF SCHEDULE I SUBSTANCES

(f) All controlled substances in schedule I that are possessed, transferred, sold, or offered for sale in violation of the provisions of this subchapter shall be deemed contraband and seized and summarily forfeited to the United States. Similarly, all substances in schedule I, which are seized or come into the possession of the United States, the owners of which are unknown, shall be deemed contraband and summarily forfeited to the United States.

PLANTS

(g)(1) All species of plants from which controlled substances in schedules I and II may be derived which have been planted or cultivated in violation of this subchapter, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the United States.

(2) The failure, upon demand by the Attorney General or his duly authorized agent, of the person in occupancy or in control of land or premises upon which such species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, shall constitute authority for the seizure and forfeiture.

(3) The Attorney General, or his duly authorized agent, shall have authority to enter upon any lands, or into any dwelling pursuant to a search warrant, to cut, harvest, carry off, or destroy such plants.

(h) All right, title, and interest in property described in subsection (a) shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

(i) Pending, or upon, the filing of an indictment or information charging a violation of this title or title III for which criminal forfeiture may be ordered under section 853 of this title, and alleging that property would, in the event of conviction, be subject to criminal forfeiture, and civil forfeiture proceeding concerning such prop-

erty commenced under this section shall, for good cause shown, be stayed pending disposition of the criminal case.

* * * * *

§ 967. Criminal Forfeitures

Section 853 of this title, relating to criminal forfeitures, shall apply in every respect to a violation of this title punishable by imprisonment for more than one year.

* * * * *

PART C

SEC. 301. (a) Without regard to the provisions of section 3617 of the Revised Statutes (31 U.S.C. 484), the Drug Enforcement Administration is authorized to set aside 25 per centum of the net amount of money realized from the forfeiture of assets seized by it under any provision of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.) to be available for obligation and expenditure only for the purpose of paying awards of compensation with respect to such forfeitures as described in subsection (b). The amounts credited under this section shall be made available during the fiscal year in which moneys are realized, except for those proceeds realized from seizures occurring prior to September 30, 1984 which may remain available for the purpose of making awards related to forfeitures arising from such seizures. The remaining 75 per centum of the net amount of money realized from such forfeitures shall be paid to the miscellaneous receipts of the Treasury and any unobligated balances remaining at the end of each fiscal year of the 25 per centum set aside shall be paid into the miscellaneous receipts of the Treasury.

(b) From the amounts set aside under subsection (a), the Drug Enforcement Administration is authorized to pay, totally within its discretion, awards to any entity not an agency or instrumentality of the United States, or to any person not an officer or employee of the United States or of any State or local government, that provides information or assistance which leads to a forfeiture referred to in subsection (a). Such awards can be made in any amount up to 25 per centum of the net amount realized from the forfeiture, or \$50,000, whichever is lesser, in any case, except that no award shall be made based on the value of the contraband.

(c) The authority provided by this section shall expire on September 30, 1984: And provided further, That the Attorney General shall conduct detailed financial audits, semiannually, of the expenditure of funds from this account.